Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as amended	)	

REPLY COMMENTS
OF THE
ILLINOIS COMMERCE COMMISSION

Pursuant to the Commission's Public Notice[1] released on November 8, 2000, the Illinois Commerce Commission ("ICC") hereby submits its Reply Comments to the Initial Comments submitted on behalf of Qwest Communications International Inc. ("Qwest"), Verizon telephone companies and Verizon Internet Services, Inc. ("Verizon") and SBC Communications Inc. ("SBC"). The ICC urges the Commission to reject the arguments advanced by the aforestated parties in their Initial Comments.

BACKGROUND

On December 24, 1996, the Commission released its First Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding, wherein the Commission held that the term "interLATA services" includes "interLATA information services"

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[1] *Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, CC Docket No. 96-146, Public Notice, DA 00-2530 (rel. Nov. 8, 2000)("*Public Notice*").

as used in the Telecommunications Act of 1996 ("TA96"), 47 U.S.C. §§ 151 et seq.[2] No party challenged this aspect of the Commission's ruling. Subsequently, on September 8, 1999, in its *Third Order on Reconsideration*, the Commission reaffirmed its prior holding."[3] Only at this point did the Bell Atlantic telephone companies (n/k/a the Verizon telephone companies) and US West, Inc. (n/k/a Qwest Communications International Inc.) (collectively "Appellants") petition for judicial review in the United States Court of Appeals for the District of Columbia Circuit.

In the Appellants' Brief on their Petition for Review, the Appellants argue that the term "interLATA service" cannot include "interLATA information services" because the statutory definition of "interLATA service" means *telecommunications* between LATAs, and "'telecommunications' and 'information services' are mutually exclusive categories," such that a "provider of 'information services' does not *provide* 'telecommunications' but rather *uses* 'telecommunications.'"[4] From this framework, the Appellants conclude that the Bell operating companies ("BOC") do not need to comply with section 271 to provide "interLATA information services" because section 271 only applies to the BOCs' provisioning of "interLATA services."[5] The Appellants unsuccessfully attempt to find support for their ultimate

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[2] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996)("*Non-Accounting Safeguards Order*") at ¶¶ 55-56.

[3] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Third Order on Reconsideration, 14 FCC Rcd 16299 (1999)("*Third Reconsideration Order*") at ¶ 41.

[4] *See e.g.*, Br. at 8-9 (citing 47 U.S.C. § 151(21)(definition of "interLATA service"); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998)("*Stevens Report*") at ¶¶ 13, 41, 69 n.138).

[5] *Id.*

contention in section 272, wherein Congress imposes different affiliate rules on "interLATA telecommunications services" versus "interLATA information services."[6]

The Commission made a motion for voluntary remand for further consideration of the challenged issue based on a more complete administrative record.[7] In support, the Commission stated that the "arguments advanced by the petitioners in their appellate brief had not been presented in the administrative proceeding."[8] The court granted the Commission's request for a voluntary remand on October 27, 2000.[9]

On November 8, 2000, the Commission issued its Public Notice. Interested parties, including Qwest, Verizon and SBC, filed Initial Comments on November 29, 2000. The ICC files these Reply Comments in response thereto.

DISCUSSION

The Appellants' arguments on appeal and remand, in which SBC has joined on remand, must be rejected because the arguments result in a misconstruction of plain and clear statutory language. The Appellants correctly note that section 271 applies to "interLATA services," which TA96 defines as *telecommunications* between LATAs.[10] The Appellants are also correct that the Commission has previously found telecommunications and information services to be mutually exclusive.[11]

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[6] *Id*. at 14-15.
[7] See, *Public Notice* at 2.
[8] *Id*.
[9] *See*, *Id*. (citing *Bell Atlantic Telephone Companies v. Federal Communications Commission*, No. 99-1479 (D.C. Cir. Oct 27, 2000)(order granting motion for remand)).
[10] *Br*. at 2 (citing 47 U.S.C. §151 (21)).
[11] *Id*. (citing *Stevens Report* at ¶ 41)).

However, the Appellants erroneously conclude that these two facts relieve the BOCs of their obligation to comply with section 271 in their provisioning of information services. First, all information services contain, by statutory definition, a *telecommunications* input.[12] Section 271 does not provide, nor the did the Appellants point to, any exception to BOC compliance with its terms.[13] An exception allowing the BOCs to provision telecommunications that constitute in-region, interLATA service as inputs in information services without regard to section 271 should not be implied. Second, the Commission's finding of mutual exclusivity between telecommunications and information services applies to those services from an end-user perspective.[14] Information service providers are end users who perceive their purchase of telecommunications as telecommunications.[15] Therefore, the Commission cannot allow the BOCs to evade the requirements of section 271 merely by tying their provisioning of telecommunications with enhanced services.

Further, the Appellants' arguments must be rejected to avoid the contravention of Congress' public policy goals. A primary purpose of TA96 is to ascertain that the steps that are necessary to erode the monopolies existing in the local exchange markets are completed prior to the BOCs gaining the authority to enter their in-region, interLATA telecommunications markets.[16] Accordingly, while the ICC understands the Appellants' underlying motivation to pursue their business interests, their arguments should be recognized as just that - an attempt to construe the statute in a manner that will provide the BOCs with an opportunity to leverage the

[12] 47 U.S.C. §151 (20).
[13] See, *Id*. at § 271 (containing no express exceptions to its terms).
[14] *Stevens Report*, at ¶¶ 58, 69 n.138.
[15] *Id*.
[16] *See, Non-Accounting Safeguards Order*, at ¶ 8 (recognizing this statutory purpose).

market power they have in the local exchange market in the information services market. The Commission must reject these arguments and permit TA96 to operate and provide the incentives intended by Congress.

I. THE BELL OPERATING COMPANIES MUST SATISFY THE REQUIREMENTS OF SECTION 271 BEFORE THEY PROVIDE *ANY* IN-REGION, INTERLATA SERVICE, INCLUDING THE PROVISIONING OF SUCH SERVICE AS AN INPUT IN INFORMATION SERVICES.

The plain and clear language of TA96 unambiguously makes section 271 applicable to any BOC provisioning of in-region, "interLATA service."[17] Specifically, subsection 271(a) sets out the section's general limitation as follows: "Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in [section 271]."[18] In addition, TA96 defines the term "interLATA service" as *telecommunications* between LATAs.[19] Accordingly, if a service constitutes telecommunications and is supplied between LATAs, BOCs may only offer the service in accordance with section 271.

It is well established that the provisioning of telecommunications as inputs in information services constitutes interLATA service when it is provided across LATA boundaries. TA96, in relevant part, defines the term "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*".[20] In the *Stevens Report*,[21] the Commission found that

[17] 47 U.S.C. § 271.
[18] *Id*. at § 271(a).
[19] *Id*. at § 151(21).
[20] 47 U.S.C. § 151(20)(emphasis added).

the plain language of TA96 makes *telecommunications* a necessary input in, or component of, all information services:

> The information service provider, indeed, is itself a user of telecommunications; that is, telecommunications is an input in the provision of an information service. Our analysis here rests on the reasoning that under this framework, in every case, some entity must provide telecommunications to the information service provider. When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications.

Stevens Report, at ¶ 69 n.138.

A BOC's provisioning of in-region, interLATA service as an input in an information service is subject to the same regulatory requirements as when it is provisioned as a stand-alone product. Section 271 does not distinguish between the BOCs' provisioning of in-region, interLATA telecommunications service as an input versus a stand-alone product. Rather, the requirements of section 271 are imposed on the BOCs' provisioning of in-region, interLATA service *without exception*.[22] It is a well-founded principle of statutory construction that statutory exceptions are not implied in the absence of evidence of a contrary legislative intent.[23] Accordingly, the BOCs' provisioning of in-region, interLATA service as inputs in information services is subject to the requirements of section 271.

The Appellants circumvent this clear statutory construction, and the Congressionally imposed requirements that follow, by focusing on the Commission's finding in the *Non-Accounting Safeguards Order* that "interLATA services" *include* "interLATA information

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[21] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998)("*Stevens Report*").

[22] *See*, 47 U.S.C. § 271 (imposing requirements on the BOCs' provisioning of in-region, interLATA services without exception).

[23] *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 671 (2000)(citing *Andrus v. Glover Const. Co*., 446 U.S. 608,

services."[24] Arguing that the term "interLATA service" is defined as *telecommunications* between LATAs and that the Commission has found that telecommunications and information services are mutually exclusive categories, the Appellants assert that the term "interLATA service" cannot *include* the mutually exclusive category of "information services."[25] Therefore, they mistakenly conclude, section 271 cannot apply to the BOCs' provisioning of information services because section 271 only applies to interLATA service.[26]

The basic premise of the Appellants' argument, however, is fatally flawed, thereby discrediting the Appellants' entire case. In particular, their reliance on the Commission's conclusion in the *Stevens Report* that "'telecommunications' and 'information services' are mutually exclusive categories" is misplaced. In the *Stevens Report*, the Commission clearly explained that the mutually exclusive nature of the two service categories exists only when judged from the end-user standpoint.[27] Further, the Commission has explained that information service providers constitute an end-user customer class.[28] The nature of the telecommunications input in information services is judged not from the perspective of the end-user consumer of the information service, but rather from the perspective of the end-user information service provider. From the information service provider's perspective, the input can be none other than telecommunications.

616-17 (1980)).
[24] *See e.g.*, *Br.* at 1-3 (providing a summary of this argument).
[25] *Id.*
[26] *Id.*
[27] *See*, *Stevens Report*, at ¶¶ 58, 69 n.138 (explaining how these services are viewed from the end user's standpoint).
[28] *Id.*

For this very reason, the Commission has previously, and correctly, concluded that the question of whether the term "interLATA service" *includes* information services, which is the focus of the Appellants' arguments, is largely *irrelevant* to a determination of whether section 271 applies to the BOCs' provisioning of in-region, interLATA service as an input in information services.[29] In the *Non-Accounting Safeguards Order*, the Commission explained this important point as follows:

> As a practical matter, we believe that interpreting 'interLATA services' to include interLATA information services will not alter the application of section 271. … [W]e conclude that the term 'interLATA information service' refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component provided to the customer for a single charge. Thus, regardless of whether we interpret 'interLATA service' to include interLATA information services, a BOC would be required to obtain section 271 authorization prior to providing, in-region, the interLATA telecommunications transmission component of an interLATA information service.

Id. Any other result would permit a telecommunications provider to avoid statutory obligations by merely tying its product with an information service. Clearly, this could not have reflected congressional intent in the passage of TA96, especially as section 271 provides no exceptions to the BOCs' compliance with its terms..

The Commission made other, consistent findings in the *Stevens Report*, which the BOCs misleadingly attempt to use in order to impose an unintended meaning upon the Commission's "mutually exclusive" language. The *Stevens Report* addressed the Commission's implementation of the universal service provisions of TA96.[30] Section 254(d) requires "[e]very telecommunications carrier that provides interstate telecommunications services" to contribute to

[29] *Non-Accounting Safeguards Order*, at ¶ 57.

Federal universal service support mechanisms.[31] In the *Stevens Report*, the Commission found that carriers who provide interstate telecommunications as inputs in information services must contribute to Federal universal service support mechanisms because they provide interstate telecommunications service.[32] The only consistent manner to interpret the Commission's findings in the *Stevens Report* is to recognize the telecommunications inputs in information services as telecommunications.

The Commission should not be misled by the Appellants' arguments that are based on Congress' distinction in section 272 between "interLATA telecommunications service" and "interLATA information service" to render a contrary result. In section 272, Congress added the terms "telecommunications" and "information" in the middle of the term "interLATA services," and made different statutory provisions applicable to each resultant term.[33] The Appellants rely on this distinction to argue that Congress intended telecommunications and information services to be mutually exclusive. The Appellants, thereby, erroneously reason that the BOCs' provisioning of telecommunications inputs in information services is beyond the scope of section 271.[34] This argument lacks merit and should be given little weight by the Commission. The Appellants' argument based on section 272 is largely irrelevant to the ultimate determination in this proceeding because the mutual exclusivity of telecommunications and information services, as discussed above, does not reach the provisioning of

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[30] *See, Stevens Report*, at ¶ 6 (stating this purpose).
[31] 47 U.S.C. § 254(d).
[32] *Stevens Report*, at ¶ 66.
[33] *See e.g.*, 47 U.S.C. §272(f) (providing different sunset dates for the section's application to each undefined term).
[34] *Br.* at 14-16.

telecommunications as inputs in information services.. Nonetheless, given the importance of proper statutory construction, the proper interpretation of section 272 should be addressed.

Congress did not define the terms "interLATA telecommunications service" and "interLATA information service" in TA96. Rather, as stated above, these two terms are derived from the combination of other terms that Congress did define in TA96, namely "telecommunications," "information services" and "interLATA service." If Congress had merely intended to distinguish between the defined terms "telecommunications" and "information services" because of the terms' mutual exclusivity, as claimed by the Appellants, then it is likely that Congress would have utilized the defined terms to make the distinction. Congress' use of the undefined terms to make the distinction indicates Congress' desire to create an additional purpose.

The Appellants argue that the purpose of Congress' use of the undefined terms was to limit the applicability of section 272's separate affiliate requirements for "interLATA telecommunications services" to telecommunications provided on a common carrier basis.[35] In particular, the Appellants contend that the term "interLATA service" means *telecommunications* between LATAs, and that the term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[36] On the other hand, the Appellants assert that the term "telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to

[35] *Id*. at 19-21.
[36] *Id*. at 19.

be effectively available directly to the public, regardless of the facilities used."[37] Accordingly, the Appellants conclude that the term "telecommunications service" includes a common carrier requirement not contained in the term "telecommunications."[38] Thus, as the term "interLATA service" by definition includes telecommunications, the Appellants argue that Congress utilized the term "interLATA telecommunications service" in section 272 to limit the applicability of section 272 to the BOCs' provisioning of interLATA service on a common carrier basis.[39]

Besides the self serving nature of this argument, the argument is unimpressive because it does not address, or even attempt to explain, Congress' use of a second undefined term - "interLATA information services." Also, it appears that Congress intended its insertion of the terms "telecommunications" and "information" into the term "interLATA service" to effectuate a *common purpose* because Congress consistently distinguished between the two undefined terms. The insertion of the term "information" into the term "interLATA service" can serve no common purpose to the one advanced by the Appellants for the insertion of the term "telecommunications."

To the contrary, consideration of the underlying defined terms supports the ICC's conclusion that Congress intended to extend protections against the BOCs' provisioning of interLATA services in all instances, both as a stand-alone product and as an input in information services. The common thread in each of the defined terms is telecommunications. Specifically, "interLATA service" is *telecommunications* between LATAs, and "information services" utilize

[37] *Id*. at 19-20.
[38] *Id*. at 20.
[39] *Id*.

a necessary *telecommunications* input.[40] Based on the plain meaning of these terms, Congress' combination of the terms "interLATA service" and "information services" must have been intended to limit the reach of the combined term to the subset of information services that utilize, as inputs, telecommunications that cross LATAs. In short, the common purpose for Congress' inclusion of the term "telecommunications" in the term "interLATA service" is to reach all telecommunications between LATAs that are not inputs in information services.

As the aforestated analysis illustrates, Congress intended to reach *all* instances of the BOCs' provisioning of telecommunications on an interLATA basis. This conclusion is consistent with the fact that Congress did not make any express exceptions to the statutory provisions that cover the BOCs' provisioning of interLATA service. The distinction intended by Congress in section 272 is merely to apply different separate affiliate requirements when BOCs provision telecommunications as inputs in information services.

In sum, a BOC must comply with section 271 before it can provide the underlying telecommunications input to an information service on an in-region, interLATA basis. In the *Non-Accounting Safeguards Order*, the Commission came to the same conclusion.[41] Specifically, the Commission appropriately reasoned that some information services' underlying, telecommunications inputs will be in-region, interLATA telecommunications, and that "a BOC would be required to obtain section 271 authorization prior to providing, in-region, the

[40] 47 U.S.C. § 151(20), (21).
[41] *Non-Accounting Safeguards Order*, at ¶ 56-57.

interLATA telecommunications transmission component of an [] information service.'"[42] The Appellants' arguments against this plain and clear statutory construction must be rejected.

II. PUBLIC POLICY MANDATES THAT THE BELL OPERATING COMPANIES SATISFY THE REQUIREMENTS OF SECTION 271 BEFORE THEY PROVIDE ANY INTERLATA SERVICE, INCLUDING ANY INTERLATA SERVICE AS AN INPUT TO AN INFORMATION SERVICE.

The AT&T Consent Decree[43] was based on the natural, monopolistic nature of the local telecommunications markets, due to which, with certain exceptions, the BOCs were prohibited from providing a number of services and products, including interLATA services.[44] In 1996, Congress passed TA96 "which was designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local phone service [] to facilitate the entry of competing companies into local telephone service markets across the country."'[45] As part of the transition plan toward competition[46] encompassed by TA96, section 271 ascertains that the BOCs do not enter the prohibited in-region, interLATA markets prior to complying with certain safeguards that are designed to promote competition in the local

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[42] *Id.* at ¶ 57.

[43] TA96 defines the term "AT&T Consent Decree" as "the order entered August 24, 1982, in the antitrust action style *United States v. Western Electric*, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982."" 47 U.S.C. § 151(3).

[44] *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983)("*Plan of Reorganization*"), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983); *see also*, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Apr. 11, 1996)(vacating the MFJ).

[45] *Iowa Utils. Bd. v. FCC*, 120 F. 3d 753, slip op. at 2 (1997), *rev'd in part on other grounds sub nom.*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

[46] The Commission has recognized the transitory nature of the statutory scheme implemented by Section 271. *Non-Accounting Safeguards Order*, at ¶ 10 (stating that "BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)").

exchange markets.[47] In other words, section 271 is part of a statutory scheme designed to ascertain that BOCs are subject to regulatory safeguards, such as the prohibition against entry into in-region, interLATA markets, until certain steps in the transition plan are completed which are designed to ascertain that BOCs do not utilize their underlying monopolies in the local exchange markets to their competitive advantage in the long distance market.

Permitting the BOCs to enter the in-region, interLATA telecommunications market to provision such services as inputs to information services would compromise the transitory scheme adopted by Congress in TA96. In fact, while the BOCs do not argue for the ability to provide in-region, interLATA service *in toto*, the ability to provide such service as an input in information services would significantly imperil the transitory scheme created by Congress because it would invent a significant exception to the protective measures enacted in section 271. Specifically, as the Commission recognized in the *Stevens Report*, certain information services are Internet-based.[48] The amount of telecommunications inputs associated with Internet-based information services is growing as the number of Internet-based information services increases and the use of Internet-based information services increases.[49] The Commission described the rapidly growing nature of Internet-based information services as follows:

> A few years ago, few consumers in this country were aware of the Internet and the notion that a packet-switched network could be used to complete a long distance call placed from a residential telephone probably would have been

[47] 47 U.S.C. § 271; *See also*, *Non-Accounting Safeguards Order*, at ¶ 8 (describing Section 271's role in the statutory scheme as linking "the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the existing interexchange carriers could enjoy an advantage from being the first to enter the other's market").
[48] *See e.g.*, *Stevens Report*, at ¶ 3 (referring to "Internet-based information services").
[49] *See Id.* (stating that "Internet service providers are major users of telecommunications").

> regarded as farfetched. Today, millions of consumers, both in the United States and around the world, daily obtain access to the Internet for a wide variety of services. … [T]he growth of Internet-based information services greatly stimulates our country's use of telecommunications.

Stevens Report, at ¶¶ 3-4. Moreover, in determining that the growth in Internet-based information services will induce greater contributions to the Federal universal service support mechanisms due to increased use of telecommunications, the Commission recognized the numerous types of telecommunications inputs for information services that exist for Internet-based information services:

> Internet service providers typically utilize a wide range of telecommunications inputs. Commenters have focused much attention on the fact that Internet service providers purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers, and pay rates incorporating those carriers' universal service obligations. What has received less attention is that Internet service providers utilize other, extensive telecommunications inputs. While a large Internet service provider engages in extensive data transport, it may own no transmission facilities. To provide transport within its own network, it leases lines (T1s, T3s and OC-3s) from telecommunications carriers. To ensure transport beyond the edges of its network, it makes arrangements to interconnect with one or more Internet backbone providers .

Stevens Report at ¶ 66.

Given the rapid proliferation of Internet-based information services and the importance of the advanced services market in general, it becomes especially important for the Commission to ensure that the transitory scheme toward competition envisioned by Congress not be compromised. Unfortunately, the results the Appellants are seeking, as set forth in their arguments, would do just that by providing the BOCs with significant competitive advantages. The BOCs would be able to tie their in-region telecommunications with information services, thereby leveraging their local telecommunications market power into the information service

market. Good public policy dictates that the Commission require the BOCs to satisfy all section 271 obligations before they are allowed to provide any in-region, interLATA services. The Commission must reject the BOCs' arguments that are designed to do otherwise.

CONCLUSION

WHEREFORE, for each and all of the foregoing reasons, the Illinois Commerce Commission respectfully requests that the Commission reject the arguments presented in the Initial Comments of Qwest Communications International Inc., Verizon telephone companies and Verizon Internet Services, Inc., and SBC Communications Inc.

December 12, 2000

Respectfully submitted,

ILLINOIS COMMERCE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon all known parties of record by mailing, by first-class mail, postage prepaid, a copy thereof properly addressed to each party.

Dated at Chicago, Illinois, this 12th day of December, 2000.

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